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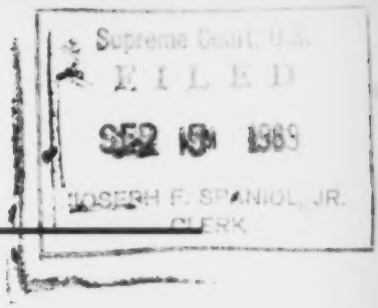

NO.

IN THE

Supreme Court of the United States

October Term, 1988

DAVID LUCAS, WILLIE DAVIS, JR., CONNIE CATER, CORLIS McKENZIE and RONNIE T. MILEY,

Appellants,

vs.

JUDY TOWNSEND, In Her Official Capacity As President Of The Bibb County Board Of Education, BIBB COUNTY BOARD OF EDUCATION, EMORY GREENE, In His Official Capacity As Chairman Of The Bibb County Board of Commissioners, BIBB COUNTY BOARD OF COMMISSIONERS, A.B. "TONY" CALDWELL, In His Official Capacity As Chairman Of The Macon-Bibb County Board of Elections, MACON-BIBB COUNTY BOARD OF ELECTIONS, And BERNARD FLETCHER, In His Official Capacity As Superintendent, Macon-Bibb County Board of Elections,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

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163PP

QUESTIONS PRESENTED

1. Whether the decision of a school board in a jurisdiction covered by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c to combine one bond issue with other bond issues as one referendum question, when the board is aware that the minority community favors one issue but opposes the others, requires preclearance under the Voting Rights Act.

2. Whether the actions of a school board in a jurisdiction covered by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c in first placing a bond referendum on the ballot, then rescinding that decision and combining the bond issue with other bond issues as one referendum question requires preclearance under the Voting Rights Act.

3. Whether the decision of a school board in a jurisdiction covered by Section

5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c to structure a bond referendum as one ballot question rather than multiple questions required preclearance under the Voting Rights Act.

PARTIES

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

DAVID LUCAS, et al.,

Appellants,

vs.

JUDY TOWNSEND, et al.,

Appellees.

OPINIONS BELOW

The decision and judgment of the three judge panel of the United States District Court for the Middle District of Georgia, convened pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S .C. § 1973c, are unreported, and are appended hereto at 1a and 39a respectively.

This decision largely adopted the court's prior opinion on the denial of a second motion for preliminary injunc-

tion. That opinion is reported at 698 F.Supp. 909 and is appended hereto at 4a.

The court's opinion denying plaintiffs' first motion for preliminary injunction is reported at 686 F.Supp. 902, and is appended hereto at 17a.

The order granting a stay pending appeal and enjoining the holding of the May 31, 1988 bond referendum, entered by Mr. Justice Kennedy, in chambers, is reported at 56 U.S.L.W. 3830. The accompanying opinion is reported at 108 S.Ct. 1763 (1988). These are appended hereto at 27a and 29a respectively.

The orders rejecting appellants' motion for reconsideration are unreported and are appended hereto at 41a, 54a and 56a.

The subsequent decision of the single-judge court rejecting appellants' claim under Section 2 of the Voting Rights

Act, 42 U.S.C. § 1973, is reported at 714 F.Supp. 525, and is appended hereto at 68a.

JURISDICTION

This is an appeal from the order of a three-judge district court denying appellants' claim that the form and structure of a bond referendum is a standard, practice or procedure affecting voting which requires preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The three-judge court was convened pursuant to 28 U.S.C. § 2284, as required by 42 U.S.C. § 1973c. Final judgment was entered on March 10, 1989, and appellants' timely motion for reconsideration under Rules 59 and 60, F.R.Civ.P., was denied on May 16, 1989. Appellants' notice of appeal was filed June 14, 1989 in the district court. By order of August 10, 1989, Mr. Justice

Kennedy extended the time within which to file this jurisdictional statement to September 5, 1989.

This Court is authorized to hear this appeal by 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

STATUTORY PROVISION INVOLVED

This appeal involves Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The text of this section is appended hereto at 112a.

STATEMENT OF THE CASE

This lawsuit was brought by five black citizens and registered voters of Bibb County, Georgia, seeking to compel the Board of Public Education and Orphanage for Bibb County (hereinafter "board") to comply with the preclearance provisions of the Voting Rights Act prior to holding a bond referendum.

The question presented in this appeal

is whether the school board's decision to combine several bond items into one referendum question is a change affecting voting under the preclearance provisions of Section 5.

The Referendum Form and Structure Decisions. The Bibb County Board of Education has for several years been considering several projects and ways of financing them. One of these projects was the air conditioning of older buildings. Another was the construction of a new high school and middle school.

On December 17, 1987, the board debated these projects and their financing. If the schools were to be built, they would have to be financed through the sale of bonds, which required referendum approval. Some board members wished to delay any referendum until 1989. A black member of the board, Robert

Brown, moved to place a smaller bond issue (for 6.5 million dollars) to complete the air conditioning of existing buildings on the ballot for March 8, 1988.[1] Stipulation of Facts, Minutes of Board, December 17, 1987. March 8th was the date of the presidential preference primary, popularly known as Super Tuesday. Jesse Jackson's name would be on that ballot, as it had

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1. The ten board members are elected, but the board has limited financial independence. At the general election in 1978, a referendum to give the board independent power to set its own budget and assess taxes was rejected by 77 percent of the voters. Plaintiffs' Supplement to Record of Election Records, p. 6.

The board does not have authority to call a referendum election or actually place a bond issue on the ballot. It must ask the county commission to do so. As a practical matter, the county commission accedes to the board's requests. The county commission, its chair, and election board and election officials are parties to this litigation.

been in 1984. Brown's motion was approved. Ibid.

At the next board meeting this action was rescinded. The prior vote had caused controversy in the community because of the election date selected and because the school construction project was not put up for referendum. Ibid., Minutes of Board, Jan. 4, 1988. The board decided to consolidate the air conditioning issue with the school construction, and seek approval for bonds up to thirty million dollars. The board discussed, and decided, that this would be a "one-item vote," i.e., voters would either vote yes or no on the whole package, and also debated the advantages and disadvantages of election dates.

The board had hired a political consultant to help decide the date of holding the referendum. The consultant

studied turnout data for past elections. One of the elections considered was the 1984 presidential preference primary, which had high black voter turnout. In recommending that the school bond referendum not be held on Super Tuesday, the report said, inter alia,

> The presidential preference primary (Super Tuesday) to be held in March may attract large numbers of voters that are not prepared to cast an informed vote on the sales tax referendum.

Ibid., Report of Kermit Keenum, Nov. 23, 1987. The board discussed the "possibility of a smaller voter turnout for a one-item vote" on a special election day, and rejected holding the referendum during the regular August primary or the general election in November. Ibid. The board decided the referendum should be held on May 31, 1988--the day after Memorial Day. This would be a special election, the bond issue being the sole item on the

ballot.

The School Bond Referendum Was a Racially Divisive Issue. Bibb County is about 38% black in population, and blacks currently comprise 33% of the registered voters. As with many issues concerning public schools in formerly de jure segregated jurisdictions, this bond issue was racially divisive, and the election results confirmed that.

The Baptist Ministers Union/Evangelical Ministerial Alliance, composed of all black ministers in Macon, favored the air conditioning project but opposed the construction of the high school. The ministers issued a statement that they were "committed to supporting air conditioning for children," but urging voters to vote against the combined bond question. Statement of October 12, 1988, sent to all black church leaders and

congregations (filed with Plaintiffs' Supplement in Support of Second Motion for Preliminary Injunction). David Lucas, the lead named plaintiff in this litigation, a state representative of fourteen years with children in the public schools, campaigned to have the issues voted on separately. Ibid., affidavit of David Lucas. He and other black citizens opposed the fifth high school, believing that there was existing space available in a predominantly black high school, and that the location of the proposed high school in a white area would put the onus on black children to be bussed. Stipulation, Board Minutes of Jan. 4, 1988, and Transcript of Nov. 1, 1988, 5.

Legal Proceedings And Section 5 Preclearance Submissions. The special election set for May 31, 1988 was not held because of the stay entered by Mr. Justice Kennedy; the referendum was eventually held, and approved by 50.8% of the voters, at the general election in November, 1988.

Bibb County is a jurisdiction covered by Section 5 of the Voting Rights Act. On March 7, 1988, counsel for appellants requested to board to rescind its decisions calling for the May 31, 1988 referendum and combining the multiple issues into one ballot question, and pointed out that the special election had not received preclearance under the Voting Rights Act. JS, 31a.

The regulations promulgated by the Attorney General to implement the preclearance provision of Section 5 of the Voting Rights Act specifically list "[a]ny

discretionary setting of the date for a special election" as being "subject to the preclearance requirement." 28 C.F.R. § 51.17(b), JS 117a. The board subsequently submitted the special bond election for preclearance, but when the Attorney General notified the board by letter of May 25, 1988, that "the information sent [was] insufficient to determine that the proposed change does not have the purpose and will not have the effect of denying or abriding the right to vote on account of race or color," JS 31a, the board decided to proceed with the special election anyway.

Appellants filed this action, and on May 27, 1988, the three-judge district court refused to enjoin the holding of the election. The district court held that (1) the setting of a special election date was not a covered change because the

procedures used in setting the date did not differ from those in effect when the Act became law; (2) that though the Attorney General's regulation stated that setting of special elections are covered changes, the regulation was not supported by the language of Section 5; and (3) appellants failed to prove the special election had "even the potential for diluting the minority vote." JS 21a-25a; 33a-34a.

On May 30, 1988, Mr. Justice Kennedy granted a stay pending appeal, preventing the holding of the May 31st referendum. JS 36a-38a. The in chambers opinion of Justice Kennedy recited:

> The three-judge court concluded...that the discretionary setting of the date of a special election is not a "change" covered by the statute, notwithstanding the provision in 28 CFR § 51.17 to the contrary. The conclusion is most problematic under our precedents, see e.g., NAACP v. Hampton County Election Commission, 470 U.S. 166, 178 (1985)

> (noting that it could not seriously be disputed "that a change in the date of an election, if effected by statute, requires approval by the Attorney General under § 5")...

JS 36a-37a. Following the injunction, the school superintendent recommended against dividing the issues on the ballot, stating,

> Balkanizing the issues and presenting multiple questions to the voters for each project would encourage a "ward healer" type of mentality and lead to the sure defeat of each question....In order to...structure a program which has the best chance of passing,...the Administration believes that we should keep the package together and try to get as many persons as possible who have an interest in any part of it to support it.

Stipulation of Facts, Memorandum of June 9, 1988. The board debated dividing the bond issues into independent ballot questions, and decided to present it as one question. It added one million dollars to the bond issue to finance capital improvements at a predominantly black school in

connection with operating a magnet program at that school, and voted to place the referendum on the November, general election ballot. Ibid., Board Minutes of June 9, 1988.

The board submitted the new election date to the Attorney General for preclearance. It submitted the date, but not the form or structure of the question.[2] The

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2. The submission recited, "The only 'change' involved in this proceeding, as defined in the regulations of the Attorney General has to do with the discretionary setting of the date for a bond referendum, 28 C.F.R. § 51.17." Ibid., Submission, p. 4.

Appellees contended in the district court that the form of the question was included in its second submission, and the Attorney General's failure to interpose an objection resulted in preclearance. The district court did not reach this defense, JS 6a, but in view of the express statement in the submission that the only change submitted was the date of election, this argument is without substance. Allen v. State Board of Elections, 393 U.S. 544, 571 (1969).

Attorney General notified the board by letter of September 26, 1988 that he did "not interpose any objection to the schedule for conducting the November 8, 1988, bond election." Ibid., Stipulation No. 11.

Appellants filed a second motion for preliminary injunction on October 11, 1988, seeking to enjoin the holding of the bond referendum because the form or structure of the referendum question had not been submitted to the Attorney General nor been precleared. The three-judge district court denied the motion by opinion of November 2, 1988, JS 4a.[3] The referendum

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3. The three-judge court subsequently ordered that judgment be entered for defendants based on the reasoning of its November 2, 1988 opinion, Order of March 7, 1989, JS 1a, and judgment was entered March 10, 1989. JS 39a. Appellants filed a motion for reconsideration under Rules 59 and 60, F.R.Civ.P. The

was held.

Election Turnouts and Results. The bond referendum passed with 50.8% of the vote, 21,915 to 21,287; whites turned out at the rate of 71% (35,153) and blacks at a rate of 60% (14,731).

On the originally scheduled date, Super Tuesday on March 8, 1988, black turnout was 51% (11,375) of black registered voters, and whites turned out at 52% (23,706).

At the August 9, 1988 statewide primary election, blacks in Bibb County turned out at a rate higher than whites, 31% to 25%; overall turnout was low (28%).

(Footnote 3 cont.)

single-judge court first rejected that motion as untimely, Order of May 3, 1989, JS 41a, but then vacated that order, finding that the motion was timely, Order of May 12, 1989, JS 54a. The three-judge court rejected the motion for reconsideration, Order of May 16, 1989, JS 56a.

At the 1984 presidential preference primary, when Jesse Jackson's name was also on the ballot, the black turnout rate was also higher than that of whites, 59% (11,492) to 37% (16,664).

Elections in Bibb County, Georgia are racially polarized.[4] The vote on the bond referendum was also polarized. Ecological regression estimates showed that 66% of

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4. Appellants presented an analysis of 15 elections in Bibb County between 1979 and 1988, including the school bond sales tax referendums in 1988. Dr. Michael Binford conducted a regression analysis on those elections, the same procedure utilized in Thornburg v. Gingles, 478 U.S. 30 (1986).

In the 12 black/white election contests, plus the 1988 presidential race, the correlation coefficient ("r") between votes and racial composition of the precincts was always between .91 and .99, 1.0 being a perfect correlation. The amount of variance ("r squared") explained by the correlation coefficient ranged from .84 to .99. Motion to Reconsider, etc., Affidavit of Michael Binford.

blacks voted against the bond issue; 57% of whites voted for the bond issue. Supra, note 4.

The Decision Below. The district court acknowledged that the exercise of discretion in a variety of actions has been held to constitute a change requiring Voting Rights Act preclearance, citing NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985), Dougherty County, Georgia, Board of Education v. White, 439 U.S. 32 (1978), Allen v. State Board of Elections, 393 U.S. 544 (1969), JS 11a. The court invited the views of the Attorney General, who filed a brief, amicus curiae. The Attorney General described the decision to "seek, at one election, a single bond or several separate bonds for discrete projects or to present separate bond requests at different elections" as a discretionary decision. JS 13a. However,

the Attorney General concluded that the form of the question was not a covered change but rather a "legislative" decision.

The district court quoted the brief of the Attorney General:

> [T]he Attorney General stated that "the normal formulation of policy by elected representatives, e.g., setting employees' salaries, hiring employees, adopting capital budgets, [does] not constitute [a change] affecting voting, even though [the decisions] result in the exercise of discretion and even though a referendum may be required for final decision." [Amicus brief at 16.] The Attorney General concluded that "the board's decision to air condition existing schools and to construct new schools is a routine matter for the board to decide and attracts no preclearance obligation." Id. Further, the school board's "discretionary decision to present the voters with a single vote on the entire bond project is not the kind of change subject to preclearance." Id. Such a decision is a "normal legislative decision unrelated to the process of holding elections." Id. at 17.

JS-14a-15a. The district court then adopted the views of the Attorney General,

holding that

> The exercise of discretion by the Bibb County school board...was no change.... [T]he form or structure of a question on a bond referendum is not a standard, practice or procedure affecting voting. The discretionary decision to submit one or more questions to the electorate is one properly left to the political process.

JS 15a.[5] The district court subsequently ordered that judgment be entered for the board based on the reasoning of this November 2, 1988 opinion. JS 1a.

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5. Appellants also asserted that the board's decision to have but one ballot issue diluted minority voting strength in contravention of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. The single-judge court found that this was not in violation of Section 2, and dismissed the complaint. Opinion of June 7, 1989, JS 68a. Appeal of that decision is pending in the U.S. Court of Appeals for the Eleventh Circuit, No. 89-8556.

THE QUESTIONS ARE SUBSTANTIAL

How a referendum question is presented to voters can affect the outcome of the election, and has the potential for the dilution of minority votes. As a jurisdiction covered by the Voting Rights Act, the Bibb County School Board is prohibited from "enact[ing] or seek[ing] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," without a prior determination by the United States District Court for the District of Columbia or the Attorney General that such standard, practice or procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color..."

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, JS 113a-114a.

The setting of the special election date as a covered change affecting voting requiring preclearance under Section 5 is no longer in dispute in this case. The board's actions in picking a low turnout date reflect upon its efforts to structure the referendum question in an effort to affect voting. But more importantly, the rationale that has compelled the Attorney General to conclude that discretionary setting of election dates are covered changes applies equally to the structure of ballot questions.

The Attorney General, who has responsibility for enforcing Section 5, has determined that the exercise of discretion involving election procedures requires preclearance, even when the discretion is authorized under laws pre-

dating the effective date of the Act. Accordingly, the setting of a date for a special election is listed by the regulations promulgated by the Attorney General as a discretionary decision requiring preclearance. 28 C.F.R. § 51.17(b), JS 117a.

The rationale for treating the setting of special election dates as covered changes under the Act is that such choices provide the opportunity for and carry the potential for discrimination, e.g., by affecting turnout. See, NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 178 (1985). That rationale applies with no less force to the form of referendum questions. The structuring of a referendum question is neither a new nor novel political technique. It is expected that those officials proposing a referendum will structure it in a manner they deem will help its passage. It may be

that the form of the referendum question will seldom have the purpose or effect of denying or abridging the right to vote on account of race or color. But, as argued below, the form clearly has the potential for affecting voting, and for discrimination. As such it requires preclearance under Section 5. The decision of the district court that the structure of a ballot question is not a covered change is a rare and significant limitation on the coverage of Section 5.

I. The Board's Decisions On The Form And Structure Of The Referendum Question Affected Voting

The board's decision on how to present the multiple issues to the voters is the best proof that this decision is a covered change affecting voting. What the board was doing was deciding how to structure the referendum so that the board had the best chance of achieving the election

result it desired. Unlike political candidates, who control neither the date of election nor the ballot format, the board here was exercising its discretionary authority to control both and to enhance its chance of winning the election. The method the board chose submerged the political will of Bibb County's black voters. This is the central kind of decision the Voting Rights Act was designed to cover.

The choices made regarding the referendum question(s) were choices that determined which votes would be effective. Voters favoring all or none of the bond issues were able to cast a fully effective ballot. Those voters who were divided on the issues were not.

The combining of multiple bond issues into one referendum is analytically akin to anti-single-shot laws. In order to

vote for one project, the Bibb County voter was required to vote for additional items he or she may have wished to oppose, or vice-versa. Anti-single-shot laws have been held to be discriminatory, and they most often discriminate against minorities, for they prevent minorities from single-shot voting for the one candidate they may favor. Anti-single-shot laws may or may not be discriminatory, depending upon the context of the election, but such provisions affect voting.

Here the combining of the multiple bond issues into one question operated in the same manner. As reflected in the statement of the Baptist Ministers Union/ Evangelical Alliance, supra, 9, minority voters were faced with the choice of opposing a project they favored in order to vote against a project they opposed.

The determination of discriminatory

purpose or effect is left to the Attorney General or the United States District Court for the District of Columbia. But the structure of ballot questions is too easily and obviously subject to manipulation for this aspect of elections to be outside the coverage of Section 5.

II. The Form And Structure Of The Ballot Question Has The Potential For Discrimination

The debate in the board and the community, and the referendum results, show that race was an issue.

Right or wrong, the issues the board was dealing with were perceived as racial issues in Bibb County, and the board was aware of this. The analysis of the election returns showed that blacks voted overwhelmingly against the bond package (66% of black voters voted no) and whites strongly supported it (57% of whites voted yes). It was an election in which race

was a significant factor.[6]

The board's decision to remove the referendum from the Super Tuesday ballot and to hold the election on the Tuesday following Memorial Day was an indication of intent to dilute minority voting strength, also prohibited by Section 5. The board's consultant had studied prior turnout, and information was available that black turnout at the 1984 presidential preference primary--in which Jesse Jackson was also a candidate--far exceeded the rate of white voter turnout. The board was aware that there would be lower

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6. As proof of the potential for discrimination, appellants offered the analysis of Dr. Michael Binford. Election days are unique, and their circumstances cannot be repeated. But given the closeness of the November vote on the referendum and the degree of polarization, the difference in racial turnout between Super Tuesday and November likely changed the outcome of the referendum.

turnout on the special election date chosen.[7] Likewise, the board was aware, both from the positions of its own members and minority community members, that an influential segment of the minority community favored the air conditioning project but opposed the high school construction. Yet the strategy, as set

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7. Blacks in Bibb County continue to suffer socio-economic disadvantages compared to whites, and the ability to run a turn-out-the-vote-campaign in the minority community would be hampered by this date selection. Twenty-one percent of black households in the county lack a telephone; 34% do not have a vehicle. The comparable figures for white households are 5% and 7%. Plaintiffs' First Request for Judicial Notice, 1980 Census of Housing, Detailed Housing Characteristics, Georgia, HC80-1-B12 Ga., Tables 55, 56 and 96. Median household income for whites is more than double that of blacks, and 20% of black households in Bibb County have income below the poverty level. Ibid., Table 97. It is difficult to turn out voters after a three day weekend for an election with one issue without telephones, cars and financial resources.

out in the superintendent's memorandum, supra, 14, was to combine the multiple issues in the hope that voters desiring one project would vote in favor of the whole.

III. The Decision Was a Discretionary Change Affecting Voting Covered by the Preclearance Provisions of the Voting Rights Act

As the district court acknowledged, the exercise of discretion has been held to constitute a covered change, requiring preclearance under the Voting Rights Act. JS 11a. The Attorney General has issued regulations which make the exercise of discretion--not the authority to exercise discretion--the touchstone for determining if preclearance is required.[8]

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8. It is the "discretionary setting of the date for a special election" that requires such decision to be precleared. 28 C.F.R. § 51.17(b)(emphasis supplied). More generally, various recurrent prac-

There is no question but that the board's decision to combine the three bond issues into a single referendum question was an exercise of discretion. The board, in its submission to the Attorney General, emphasized its discretion under Georgia law. Stipulation of Facts, Submission, p. 4. And the Attorney General, in his brief, found that the decision to "seek, at one election, a single bond or several separate bonds for discrete projects or to present separate bond requests at separate elections" was a discretionary decision. JS 13a.

Nor, as discussed at Section II

(Footnote 8 cont.)

tices may be exempt if based upon "certain established contingencies," § 51.14. Conversely, the preclearance of enabling legislation establishing "contingent or nonuniform requirements" does not remove the requirement of preclearance when those contingencies arise. § 51.15.

above, can there be any question on this record that the decision to consolidate three separate bond issues into a single referendum question had the potential for discrimination. Black leaders in the community actively campaigned against consolidation of the bond issues because they were in favor of one project but against others. The board was not only aware of these views, it took these views into account in its decision to consolidate--so that all three questions would pass.

The discretionary decision as to the form of a bond referendum question is precisely the kind of change which Congress intended to cover under Section 5. As this Court has noted, "Section 5 is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they

affect Negro voters." Georgia v. United States, 411 U.S. 526, 531 (1973). Changes affecting voting are required to be pre-cleared if they have the "potential for discrimination," NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 181 (1985)(emphasis in original).

The district court's conclusion to the contrary steadfastly ignores the "reality" of the situation. The court found it significant that state law enables county school boards to seek the issuance of bonds if they determine that the debt is in the "best interests of education in the county," JS 13a. While acknowledging that the decision as to the form of the election referendum was a discretionary decision, the court held that that decision was a "legislative decision unrelated to the process of holding elections," comparable to setting

salaries and adopting budgets, and thus "not the kind of change subject to preclearance."[9] JS 15a.

To the contrary, the board decision as to the structure or form of the referendum question related exclusively to the structure of the election.[10] While the

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9. In doing so, the court relied on the conclusion of the Attorney General, in the amicus brief, that the decision was a "normal legislative decision unrelated to the process of holding elections." JS 15a.

The single judge court found the Attorney General's position "somewhat inconsistent," JS 78a, particularly in light of the Attorney General's regulation defining discretionary setting of special elections as covered changes. Likewise, after having the benefit of the amicus brief, counsel for the board stated that "in all candor I'm not sure I can distinguish [setting an election date] from setting the form of the question..." Transcript of Nov. 2, 1988, 45.

10. If the board's judgment was that none of the projects should go forward unless all did, the board would not be required to sell the bonds for any

board has the authority to make judgments as to what funds the school system needs to spend, that judgment must be submitted to the voters when the board wishes to incur bonded debt. Whether or not that judgment is termed "legislative," the decision of how to present those questions to the voters was a decision of how the election was to be held. Indeed, terming it "legislative" brings it squarely under the language of Section 5, which covers "enact[ing]" voting practices or procedures. JS 112a. The board's decision was unequivocally a change affecting voting.

(Footnote 10 cont.)

project even though the voters approved one or all of them. The combining of the multiple issues addressed how to get them approved by a majority of voters, not whether each or all of them were in the best interest of education.

Such decisions are central to the operation of Section 5 of the Voting Rights Act, and are clearly covered changes.

CONCLUSION

The decision of the district court results in a significant exception to the coverage of the Voting Rights Act, and merits plenary review by this Court.

Respectfully submitted,

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(Counsel of Record)
Laughlin McDonald
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COUNSEL FOR APPELLANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

C.A. 88-166-1-MAC (WDO)

[Filed March 7, 1989]

DAVID LUCAS, et al.,	:
	:
Plaintiffs,	:
	:
vs.	:
	:
JUDY TOWNSEND, et al.,	:
	:
Defendants.	:
	:

O R D E R

The parties having stated at a pretrial conference held on March 2, 1989, before the originating judge that they do not desire to present further evidence or briefs on the issues required to be heard by this 28 U.S.C. § 2284 court of three judges, this court of three judges, for the reasons set forth in its order of November 2, 1988, does hereby declare and

adjudge that the decision of the defendant Bibb County Board of Education to submit a single twenty-nine million dollar bond issue by referendum to the voters of Bibb County, Georgia rather than to submit four separate bond issues for the four categories of school improvements to be paid for by said bond issue, is not encompassed by Section Five of the Voting Rights Act of 1965 and, therefore, did not have to be submitted to the Attorney General of the United States for Section Five preclearance.

There being no further issues to be decided by this court of three judges, this court of three judges does hereby dissolve itself, leaving all remaining issues to be decided by the originating judge. Further, there being no just reason to delay entry of judgment on plaintiffs' Section Five claims, the clerk

is expressly directed to enter judgment thereon for the defendants. Rule 54(b), Federal Rules of Civil Procedure.

SO ORDERED, this 7 day of March, 1989.

s/ James C. Hill
James C. Hill
United States Circuit Judge

s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

s/ Duross Fitzpatrick
Duross Fitzpatrick
United States District Judge

###

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

C. A. 88-166-1-MAC (WDO)

[Filed November 2, 1988]

[698 F.Supp. 909]

DAVID LUCAS, et al.,	:
	:
Plaintiffs,	:
	:
vs.	:
	:
JUDY TOWNSEND, et al.,	:
	:
Defendants.	:
	:

Before HILL, Circuit Judge, OWENS, District Judge, and FITZPATRICK, District Judge.

OWENS, District Judge:

Included for consideration by Bibb County voters on the general election ballot is the question of whether twenty-nine (29) million dollars of general obligation bonds should be issued to pay for the following improvements within the Bibb County school system: (1) air

conditioning all existing schools not presently air conditioned; (2) building a fifth high school to serve a projected 53% black-47% white student body; and (3) renovating Northeast High School into a magnet high school. The selection of November 8th, the date of the general election, as the date for this bond referendum was submitted to and precleared by the Attorney General of the United States pursuant to the Voting Rights Act of 1965. Nevertheless, plaintiffs contend that the Voting Rights Act requires the submission to the Attorney General of not only the date for this bond referendum but also the form or the structure of the question itself. Plaintiffs contend that the discretionary decision of the school board to submit the approval or disapproval of the entire twenty-nine (29) million dollar bond issue to the electorate as a

single bond issue rather than to submit the questions of (1) air conditioning existing schools, (2) constructing a new school, and (3) renovating Northeast High School as three separate bond issues is a "change affecting voting."[1] Arguing that the form of the bond referendum has been neither submitted to nor precleared by the Attorney General,[2] plaintiffs ask this

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1. During oral arguments held before a district court of three judges, plaintiffs argued that the school board's decision would have been equally as cognizable under Section Five of the Voting Rights Act if the board had determined to submit the issues to the electorate as separate questions rather than as a single package. Thus, plaintiffs effectively argue that any question submitted by ballot to the electorate must be precleared by the Attorney General.

2. The parties disagree as to whether the form of the question was in fact submitted to and precleared by the Attorney General. In light of this court's decision, see Discussion, ante, the court need not address this dispute.

three-judge court[3] to enjoin the inclusion of this bond referendum on next Tuesday's general election ballot.

DISCUSSION

In 1965 Congress enacted the Voting Rights Act to eliminate the racial discrimination in voting that Congress believed to still exist in a minority of the states of these United States, chiefly those in the traditional South. As contemplated, only eleven states were brought within the coverage of the Act--South Carolina, Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia, twenty-six counties in North Carolina, three counties

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3. "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." 42 U.S.C. § 1973c.

in Arizona, one county in Hawaii, and one county in Idaho. South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).

Section Five of the Act, 42 U.S.C. § 1973c, provides that whenever a covered state or political subdivision "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 ..." it may not utilize or implement such change until (a) it has secured a judicial determination in the United States District Court for the District of Columbia that the change does not have the purpose or effect of denying the right to vote on account of race or (b) it has submitted such change to the Attorney General of the United States and the Attorney General has

not interposed an objection within sixty days. While the Act does not specifically provide a remedy for failure to comply with Section Five, the Supreme Court has held that a complaint for injuctive relief to be heard by a district court of three judges may be filed in any United States District Court and that court, if it is shown that Section Five applies, must enjoin the utilization or implementation of such change until Section Five is complied with. Allen v. Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).

A district court of three judges convened pursuant to Section 5 of the Voting Rights Act conducts a limited inquiry. First, the court determines whether questioned activity is a covered voting change. If, and only if, that question is answered in the affirmative,

the court then determines whether the questioned activity has been precleared either by the Attorney General or by declaratory judgment from the United States District Court for the District of Columbia. See United States v. Board of Supervisors, 429 U.S. 642, 645-47, 97 S. Ct. 833, 834-35, 51 L.Ed.2d 106, 110 (1977).

While to effectuate the purpose of the Voting Rights Act, Section 5 is to be given broad scope, NAACP v. Hampton County Election Comm., 470 U.S. 166, 175-76, 105 S.Ct. 1128, 1133-34, 84 L.Ed.2d 124, 132 (1985); Allen v. Board of Elections, 393 U.S. 544, 566-67, 89 S.Ct. 817, 832-33, 22 L.Ed.2d 1, 17-18 (1969), "[t]he language of § 5 clearly provides that it applies only to proposed changes in voting procedures." Beer v. United States, 425 U.S. 130, 138, 96 S.Ct. 1357, 1362, 47 L.Ed.2d

629, 638 (1976), quoted in McCain v. Lybrand, 465 U.S. 236, 245, 104 S.Ct. 1037, 1043, 79 L.Ed.2d 271, 279 (1984).

Plaintiffs contend that the school board's exercise of its discretion in submitting the school improvement plan to the voters as a single question is by definition a "change affecting voting." Defendants vigorously argue that the school board's exercise of its discretion in this matter is not a "change affecting voting."

While the exercise of discretion in setting dates for elections, changing candidate qualifications or altering voting procedures have all been held to constitute changes requiring Voting Rights Act preclearance, see e.g., NAACP v. Hampton County Election Comm., supra; Dougherty County, Georgia, Board of Education v. White, 439 U.S. 32, 99 S.Ct. 368,

58 L.Ed.2d 269 (1978); Allen v. State Board of Elections, supra, plaintiffs have cited no authority for the proposition that a school board's or any other board's exercise of discretion in formulating a question to be submitted to the electorate constitutes a change affecting voting. Likewise, defendants are unable to provide this court with authority supporting their position that it is not a covered change.

Though not binding upon this or any other court, the Attorney General's interpretation of both the scope of Section 5 and his regulations promulgated thereunder is entitled to particular deference. See Dougherty County, Georgia, Board of Education, 439 U.S. at 39, 99 S.Ct. at 372, 58 L.Ed.2d at 278; NAACP v. Hampton County Election Comm., 470 U.S. at 178-79, 105 S.Ct. at 1135-36, 84 L.Ed.2d at 134. Due to the novel nature of

plaintiffs' contentions and the absence of either case authority or a regulation on point, the Attorney General was invited by the panel of three judges to submit his views on the matter under consideration. In response, the United States of America applied for leave to participate in this case as amicus curiae. The United States' application was granted on November 1, 1988.

In its amicus curiae brief, the United States noted that state law enables county school boards to seek the issuance of bonds upon a determination that the incurrence of such debt is in the "best interests of education in the county." Brief for United States as Amicus Curiae ("Amicus Brief"), 3; see O.C.G.A. § 20-2-430. "[D]ecisions such as the manner in which the purpose of the bonds is identified, whether to seek, at one election, a

single bond or several separate bonds for discrete projects or to present separate bond requests at different elections, are left to the defendants' discretion." Amicus brief at 4 (footnote omitted). Commenting upon the above-described state procedure, the Attorney General stated that "the normal formulation of policy by elected representatives, e.g., setting employees' salaries, hiring employees, adopting capital budgets, [does] not constitute [a change] affecting voting, even though [the decisions] result in the exercise of discretion and even though a referendum may be required for final decision." Id. at 16. The Attorney General concluded that "the board's decision to air condition existing schools and to construct new schools is a routine matter for the board to decide and attracts no pre-clearance obligation."

Id. Further, the school board's "discretionary decision to present the voters with a single vote on the entire bond project is not the kind of change subject to preclearance." Id. Such a decision is a "normal legislative decision unrelated to the process of holding elections." Id. at 17.

After careful consideration, this court agrees with the views held by the United States. First, Georgia school boards before November 1, 1964, were authorized to and had exercised their discretion in formulating questions for bond referendums. The exercise of discretion by the Bibb County school board was thus no change. Second, the form or structure of a question on a bond referendum is not a standard, practice or procedure affecting voting. The discretionary decision to submit one or more

questions to the electorate is one properly left to the political process.

> It tortures the language of the Act to conclude that [the form of a question on a bond referendum], having nothing to do with the conduct of elections as such, is State action "with respect to voting." No one is denied the right to vote; nor is anyone's exercise of the franchise impaired.

Dougherty County, Georgia, Board of Education, 439 U.S. at 51, 99 S.Ct. at 379, 58 L.Ed.2d at 286 (Powell, J., dissenting) (language within brackets substituted for original by this court).

Plaintiffs' motion for a preliminary injunction is thus DENIED this 2nd day of November, 1988.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

C.A. 88-166-1-MAC (WDO)

[Filed May 27, 1988]

[686 F.Supp. 902]

DAVID LUCAS, et al.,	:
	:
Plaintiffs,	:
	:
vs.	:
	:
JUDY TOWNSEND, et al.,	:
	:
Defendants.	:
	:

OWENS, District Judge

Plaintiffs in their complaint filed this 27th day of May at 2:20 P.M. contend that the Tuesday, May 31, 1988, bond referendum election to be held in Bibb County, Georgia, should be temporarily restrained by the receiving single district judge and preliminarily enjoined by the court of three judges--Circuit Judge James C. Hill, District Judge Duross

Fitzpatrick and Chief District Judge Wilbur D. Owens, Jr., appointed this date by Chief Circuit Judge Paul Roney pursuant to 28 U.S.C. 2284(b)--because it is being held in violation of Section Five of the Voting Rights Act, 42 U.S.C. 1973(c).

Plaintiffs' motion for a temporary restraining order came on to be heard before the receiving single judge who heard evidence and argument from plaintiffs and defendants. At the conclusion of the hearing the parties were asked if they desired a further hearing preceding the scheduled election before the court of three judges. All parties responded that if such a hearing were held, they would present nothing other than what was presented this afternoon so that it is agreeable with all for the court of three judges to decide this controversy on the basis of all that was presented to and

heard by the receiving single district judge. Accordingly, the court of three judges conferred by telephone, carefully considered the contentions of the parties and decided as follows:

> Section Five of the Act, 42 U.S.C.A. §1973c, provides that whenever a covered state or political subdivision "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 ..." it may not utilize or implement such change until (a) it has secured a judicial determination in the U.S. District Court for the District of Columbia that the change does not have the purpose or effect of denying the right to vote on account of race or (b) it has submitted such change to the Attorney General of the United States and the Attorney General has not interposed an objection within sixty days. While the Act does not specifically provide for a remedy for failure to comply with Section Five, the Supreme Court has held that a complaint for injunctive relief to be heard by a district court of three judges may be filed in any U.S. District Court and that court if it is shown that Section Five applies must enjoin the utilization or implementation of

such change until Section Five is complied with. Allen v. Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed. 2d 1 (1969).

* * * * * * * * *

This district court of three judges is required to resolve any dispute as to the coverage of Section Five or, said more directly, to determine "whether such changes have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5." Georgia v. United States, 411 U.S. 526, 534, 93 S.Ct. 1702, 1707, 36 L.Ed.2d 472, 481 (1973). The question of coverage to be decided by this court does not include the ultimate question required by Section Five to be presented to the District Court for the District of Columbia or the Attorney General, i.e., whether or not the enactment in truth and fact has a discriminatory purpose or effect. Perkins v. Matthews, 400 U.S. 379, 383, 91 S.Ct. 431, 434, 27 L.Ed.2d 476, 482 (1971).

Plaintiffs contend that the school bond referendum scheduled for May 31, 1988, constitutes a "change," as that term has been defined under 42 U.S.C. § 1973c, and therefore, the bond referendum cannot be held on that date absent

preclearance from the Attorney General's office. Plaintiffs support this position by citing the court to 28 C.F.R. § 51.17. This section provides in relevant part:

> (a) The conduct of a special election (e.g., an election to fill a vacancy; an initiative, referendum, or recall election; or a bond issue election) is subject to the preclearance requirement to the extent that the jurisdiction makes changes in the practices or procedures to be followed.
>
> (b) Any discretionary setting of the date for a special election or scheduling of events leading up to or following a special election is subject to the preclearance requirement.

Plaintiffs have also presented evidence that the Attorney General, has, in fact, refused to preclear the May 31st, 1988, election date[1] because he had not been

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1. Defendants have made an effort to comply with the Attorney General's regulations, however, their compliance was done under protest.

provided with sufficient data to make an informed decision on the subject. Based upon these facts, and without any more evidence, plaintiffs assert that Section Five is implicated because the election, as scheduled, is a "change," and that it has the "potential for diluting the value of the Negro vote." See Georgia v. United States, 411 U.S. at 534 (emphasis added).

Plaintiffs have presented no evidence, however, that the standard, practice, or procedure for scheduling bond referendums presently being utilized in this state is any different from that in force or effect when the Voting Rights Act was adopted and/or extended. Even assuming that such is the case, the evidence presented before this court has utterly failed to demonstrate that the holding of the bond referendum on May 31st, 1988, has even the potential for diluting the minority vote.

Plaintiffs' argument is that there would be an adverse effect with regard to voting by minorities if a bond referendum, such as the one at issue, is conducted on a date other than the date of a statewide or national election. As the argument goes, this would be necessary in order to insure a large black voter turnout. We are aware of nothing in Section Five jurisprudence which requires such a result. There is no reason to suspect that blacks or whites will turn out in greater or less numbers in proportion to each other if the election is conducted at a time when only one issue is put before the voters, as opposed to a date when other issues or races are pending. To find to the contrary would, in effect, restrict all special elections to being held at the time of a general primary or general election, and would entirely negate the purpose of having a

special election law in the first place. Plaintiffs have presented no evidence to refute such a conclusion. Plaintiffs have cited the court to the Eleventh [sic Fifth] Circuit's decision in Garcia v. Guerra, 744 F.2d 1159 (11th [5th] Cir. 1984), however, this case is not controlling because the "change" therein clearly implicated the migrant farmworkers' ability to participate in the planned election.

While the court recognizes that the Attorney General plays a central role in formulating and implementing Section Five, and that his interpretation of the scope of this section is entitled to particular deference, the ultimate determination of whether a change is covered by Section Five is reserved for a three-judge panel in the local district court. See Allen v. Board of Elections, 393 U.S. 544, 562-63

(1969); and Garcia, 744 F.2d at 1163. The Attorney General's regulation making all discretionary special elections subject to Section Five's coverage is simply not supported by the language found in 42 U.S.C. §1973c. The electoral action involved must constitute a genuine change from past practices, and further it must have, at minimum, the potential for discrimination. The facts as presented herein, do not demonstrate these requirements.

Accordingly, because plaintiffs have failed to present any evidence that the school bond referendum scheduled for May 31st, 1988, is a cognizable "change" under Section Five of the Voting Rights Act, and that the election will in some way discriminate against minority voters, the court must and does hereby DENY plaintiffs' prayer for preliminary injunctive

relief.

For the Court of Three Judges, this 27th day of May, 1988.

s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
Chief United States
District Judge

###

[56 USLW 3830]

SUPREME COURT OF THE UNITED STATES

No. A-898

DAVID LUCAS, et al.,
Appellants

V.

JUDY TOWNSEND,
President of the Bibb County
Board of Education, et al.

O R D E R

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED THAT the referendum election set for May 31, 1988 in Bibb County, Georgia, be and the same is hereby stayed and that each respondent and named defendant below be, and is hereby, enjoined from causing the same to be held, pending the timely docketing of an appeal in the above-entitled cause from the order

of the United States District Court for the Middle District of Georgia, Civil Action No. 88-166-1-Mac (WDO), filed May 27, 1988. Should a timely appeal be so docketed, this order shall continue, pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court for the Middle District of Georgia is affirmed, this order is to terminate. In the event that jurisdiction is noted or postponed, this order shall remain in effect pending the sending down of the judgment of the Court or until further order of the Court.

/s/ Anthony M. Kennedy

Associate Justice of the Supreme Court of the United States

Dated this 30th day of May, 1988.

[108 S.Ct. 1763]
[56 USLW 3833]

IN THE SUPREME COURT OF THE UNITED STATES

LUCAS ET AL. v. TOWNSEND ET AL.

No. A-898

JUSTICE KENNEDY, Circuit Justice.

This is an application to enjoin a bond referendum election scheduled for May 31, 1988, in Bibb County, Georgia. The applicants are five black citizens registered to vote in Bibb County. On May 27, 1988, a three-judge District Court for the Middle District of Georgia declined to issue an injunction, concluding that the applicants had failed to establish that holding the election now contemplated would violate Section 5 of the Voting Rights Act, 79 Stat., as amended, 42 U.S.C. §1973c. The United States has submitted, and I have reviewed, a memorandum advising me that it supports the

applicants' request for immediate injunctive relief. I have also reviewed and considered a submission by applellees in opposition.

I

On Decemer 17, 1987, the Bibb County Board of Education resolved to place a bond referendum on the March 8, 1988 ballot, a primary election date popularly known as "Super Tuesday." The bond issue was intended to help defray the cost of air conditioning certain local schools. The Board subsequently voted, on January 4, 1988, to rescind its prior resolution. It resolved to postpone the referendum until May 31, 1988, when it would be voted on with a second bond issue for the building of a new high school.

On March 7, 1988, counsel for the applicants requested the Board to rescind its vote calling for the May 31 referen-

dum. In his letter to the Board, counsel argued that changing the date of the election from a primary day would adversely affect minority voter turnout. The letter also argued that the two bond issues had been combined in an effort to manipulate the minority vote, and noted that the call for the May 31 referendum had not yet been submitted for preclearance to the Voting Section of the United States Department of Justice.

On March 30, 1988, the State authorities applied to the Voting Section of the Civil Rights Division of the Department of Justice for preclearance. On May 25, 1988, the Civil Rights Division responded that "the information sent is insufficient to enable us to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on

account of race or color," and asked for additional information, including a "detailed explanation of the reason for choosing May 31, 1988, as the bond election date."

The Division also requested that State authorities respond to allegations (i) that the Super Tuesday date had been abandoned because the turnout of black voters was expected to be high on that date, and (ii) that the two bond issues were consolidated to prevent black voters from voting separately on each of the proposed projects. Finally, the Division noted that the Attorney General has 60 days to consider a completed submission, and that the period would begin to run upon receipt by the Division of all necessary information.

Applicants sought an injunction prohibiting the Board form holding the election on the ground that the election

had not been precleared by the Attorney General in accordance with Section 5. On May 27, 1988, the three-judge court denied the request for an injunction. The court stated that it was required to determine whether the actions proposed "have the potential for diluting the value of the Negro vote and are within the definitional terms of §5." Opinion, at 3, quoting Georgia v. United States, 411 U.S. 526, 534 (1976). It also adverted to the Attorney General's regulation providing that any discretionary setting of the date for a special election, which is defined to include a referendum, is subject to the preclearance requirement, 28 CFR §51.17 (1987), and acknowledged that the Attorney General had not precleared the referendum.

The court concluded that the applicants had failed to present evidence that the procedures to be utilized in the

upcoming election differ from those in use at the time the Act became law. Accordingly, it concluded that the referendum was not a "change" covered by Section 5. While the court noted that the Attorney General's regulation provides otherwise, it held that the regulation is not supported by the language of Section 5. Alternatively, the court concluded that plaintiffs had failed to show that holding the referendum on May 31, 1988, "has even the potential for diluting the minority vote." Opinion, at 4-5. Accordingly, the court declined to issue the injunction prayed for by the applicants. This application followed.

II

The principles that control a Circuit Justice's consideration of in-chambers applications for equitable relief are well settled. As a threshold consideration, it

must be established that four members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See White v. Florida, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers); Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). I must also be persuaded that there is a fair prospect that five Justices will conclude that the case was erroneously decided below. See, e.g., Graves v. Barnes, 405 U.S. 1201, 1203 (1972). Finally, an applicant must demonstrate that irreparable harm will likely result from the denial of equitable relief and, in appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public. See Rostker v. Goldberg, supra, at 1308; Times Picayune

Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 1304 (1974) (Powell, J., in chambers).

The substantiality of the federal questions presented by the case cannot be doubted. Section 5 provides that certain jurisdictions, including the one in which this case arose, may not implement any election practices different from those in force on November 1, 1964, without first obtaining approval from the United States District court for the District of Columbia or, alternatively, from the Attorney General. Neither statutory requirement has been met in this case. The three-judge court concluded, however, that the discretionary setting of the date of a special election is not a "change" covered by the statute, notwithstanding the provision in 28 CFR §51.17 to the contrary. The conclusion is most problematic under

our precedents, see, e.g., NAACP v. Hampton County Election Commission, 470 U.S. 166, 178 (1985) (noting that it could not seriously be disputed "that a change in the date of an election, if effected by statute, requires approval by the Attorney General under §5"), and I have concluded that four members of the Court would likely vote to note probable jurisdiction and that there is a fair prospect that the Court would vote to reverse the judgment below.

I am further persuaded that irreparable harm likely would flow from a denial of injunctive relief. Permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election. Even if the

election is subsequently invalidated, the effect on both applicants and defendants likely would be most disruptive. Further, although an injunction would doubtless place certain burdens on defendants, such burdens can fairly be ascribed to the defendants' own failure to seek preclearance sufficiently in advance of the date chosen for the election. On balance, I conclude that the equities favor the applicants. Today I have entered an order enjoining the election, pending the timely docketing of an appeal.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

C.A. 88-166-1-MAC (WDO)

[Filed March 10, 1989]

DAVID LUCAS, et al., :
:
Plaintiffs, :
:
vs. :
:
JUDY TOWNSEND, et al., :
:
Defendants. :
:

JUDGMENT

The Court by order dated and filed March 7, 1989, having determined pursuant to Rule 54(b), Federal Rules of Civil Procedure, that there being no just reason to delay entry of judgment on plaintiffs' Section Five claims, JUDGMENT is hereby entered in favor of defendants.

This 10th day of March, 1989.

GREGORY J. LEONARD, Clerk

By: s/ Helen F. Newberry

Helen F. Newberry
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

[Filed May 3, 1989]

C.A. 88-166-1-MAC (WDO)

DAVID LUCAS, et al.,	:
	:
Plaintiffs,	:
	:
vs.	:
	:
JUDY TOWNSEND, et al.,	:
	:
Defendants.	:
	:

O R D E R

On November 2, 1988, a district court panel of three judges denied plaintiffs' motion to enjoin the inclusion of a school bond referendum on the general election ballot submitted to the voters on November 8, 1988. See Lucas v. Townsend, 698 F.Supp. 909 (M.D. Ga. 1988). Plaintiffs brought their motion pursuant to Section Five of the Voting Rights Act of 1965, see 42 U.S.C. § 1973c, and they contended that

the form or structure of the bond question as phrased by the Bibb County Board of Education and as submitted to the voters was a change affecting voting. The three-judge panel held that "Georgia school boards before November 1, 1964, were authorized to and had exercised their discretion in formulating questions for bond referendums. The exercise of discretion by the Bibb County school board [in phrasing the question as it did] was thus no change." Lucas, 698 F.Supp. at 912. Further, the three-judge panel held that "the form or structure of a question on a bond referendum is not a standard, practice or procedure affecting voting." Id. The referendum was submitted to the voters, and the voters approved the school bond by a vote of fifty-one percent (51%) to forty-nine percent (49%).

On March 7, 1989, following a pretrial conference held in chambers on March 2, 1989, the three-judge panel issued a final decision on plaintiffs' Section Five claim.[1*] The panel stated as follows:

> [T]he decision of the defendant Bibb County Board of Education to submit a single twenty-nine million dollar bond issue by referendum to the voters of Bibb County, Georgia rather than to submit four separate bond issues for the four categories of school improvements to be paid for by said bond issue, is not encompassed by Section Five of the Voting Rights Act of 1965 and, therefore, did not have to be submitted to the Attorney General of the United States for Section Five preclearance.

Lucas v. Townsend, C. A. 88-166-1-MAC (WDO), unpublished opinion, p. 1 (M.D. Ga., March 7, 1989). Based upon these

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* [Because of the length of footnote 1, the footnotes are printed as endnotes beginning infra, 47a.]

previous orders, judgment was entered for defendants on March 10, 1989.

Despite counsel's statements made during the March 2 pretrial conference to the effect that the three-judge panel's decision and the basis therefor make irrelevant any additional evidence which might be submitted, see supra note 1, plaintiffs have on March 27, 1989, filed a motion to reconsider prior opinion and judgment, to enter a new judgment or alter or amend the judgment and supplement the record. This motion was served on opposing counsel on March 24, 1989. Plaintiffs filed this motion pursuant to Rules 59(a) and (e) and Rule 60 of the Federal Rules of Civil Procedure.

Rule 59(e) of the Federal Rules of Civil Procedure requires that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry

of the judgment." A motion filed after such period is untimely, and a district court is without jurisdiction to hear the motion. See United States v. One Remington 12 Gauge Shotgun, Serial No. 322336V, with a Barrel Length of 13 Inches and an Overall Length of 24-3/4 Inches, 709 F.2d 1468, 1469 (11th Cir. 1983); see also Wright & Miller, Federal Practice and Procedure: Civil § 2817, pp. 108-109. The 10 day period may not be extended. See Fed.R.Civ.P. 6(b); see also Elias v. Ford Motor Co., 734 F.2d 463, 466 (1st Cir. 1984).

Plaintiffs' motion is clearly one which falls within the ambit of Rule 59. Just as clearly, plaintiffs' motion was served 14 days after the entry of judgment. Such motion is therefore untimely, and the court may not and thus will not consider it.

Plaintiffs' inclusion of Rule 60 as a mechanism for its motion is merely an attempt to avoid the procedural bar imposed by the 10 day limitation in Rule 59. Plaintiffs have pointed to no clerical mistakes in the judgment. See Fed.R.Civ.P. 60(a). Plaintiffs have presented absolutely no evidence, new or otherwise, which goes to the central question in a Section Five claim--whether the challenged conduct is a change affecting voting. See Fed.R.Civ.P. 60(b). The three-judge panel expressly held that the exercise of an elected board's discretion in formulating a referendum question to be submitted to the voters by ballot was neither a change nor a standard, practice or procedure affecting voting. Plaintiffs' "additional evidence" merely summarizes voting patterns; it does not address the above-stated holding.

In accordance with the above discussion, this court determines that plaintiffs' motion is untimely and for that reason it cannot be considered[2] and must be DENIED.[3]

SO ORDERED, this 3rd day of May, 1989.

s/Wilbur D. Owens, Jr.

Wilbur D. Owens, Jr.
United States District Judge

* * * * * * * * *

Endnotes of Opinion of May 3, 1989

1. During the pretrial conference, the court and counsel for plaintiffs engaged in the following discussion:

> THE COURT: It may not but let's talk about Section 5 first. The record is really complete for the Section 5 question, isn't it?
>
> MR. BRADLEY: Well, Your Honor, one of the questions in Section 5 is does something have the potential to have the racial effect. Now, that question can be answered in the negative by saying it is not a covered change as the last opinion the Court had. But if that question isn't answered on that grounds, then the question of can it possibly have a racial effect is relevant to a Section 5 question.

(Foonote 1 cont.)

THE COURT: But since it's been answered on that ground, then it doesn't have any relevance.

MR. BRADLEY: Yes, Your Honor, although I just made a statement that was a preliminary injunction ruling, it's not a final ruling.

THE COURT: Yes sir, but assuming that the same ruling were issued on a declaratory judgment basis, then there's nothing else to be put in the file, is there?

MR. BRADLEY: I would like the opportunity to put in the file--but you're right, that that question can be answered in the fashion the Court already has without further evidence.

THE COURT: You say you would like the opportunity to put what in the file?

MR. BRADLEY: The racial polarization evidence in. I don't know what it would turn out, but I would like the opportunity to put it in on the Section 5 question, as well as Section 2 claim, of course.

THE COURT: Well, the Section 2 claim is a different question. I'll have to decide that. We're going to separate these two.

(Foonote 1 cont.)

MR. BRADLEY: I agree that they are separate questions, they are for separate divisions of the Court.

THE COURT: Right, but I fail to perceive what the answers to these interrogatories will have to do with a Section 5 question.

MR. BRADLEY: Well, perhaps I articulated badly.

THE COURT: I just don't understand; you work in this area more than I do, so explain it to me.

MR. BRADLEY: Well, you can have something that is clearly a covered change under the Voter Rights Act, but which a Court would say, 'Yes, that is a covered change but there is absolutely no theoretical way that this could have an impact on race, racial effect, and therefore, even though it is a change, it is not covered under Section 5.' So, sometimes whether or not something can have a racial impact is a relevant question, or it always is, and one of the ways you prove that is by showing the effect. If the Court were asking, show me how this could impact on blacks, I would say, well, here's the proof that it did impact. That's how it's relevant.

THE COURT: But if it's not a practice that pertains to voting, it

(Foonote 1 cont.)

doesn't matter whether it has a racial effect or not, does it?

MR. BRADLEY: I agree with that statement, Your Honor.

THE COURT: Sure, so then it would be irrelevant to bring in these statistics that you're talking about, if the Court didn't deal with them. The ruling we have made doesn't go to the effect.

MR. BRADLEY: Yes, it depends upon how that legal question is answered. If the Court had said the opposite, that this is a covered change, the defendants would have to be able to come in and say, yes, it's a change but there's no theoretical way it could have a racial impact and put on evidence that they should not be covered by Section 5. That's how it fits into the legal question. But again, the Court having answered in the way it has, if the Court has the same answer on final judgment, then Your Honor is correct.

THE COURT: Well, as to the judgment already rendered, is there anything either of you haven't submitted that you want to submit to the three of us?

MR. BRADLEY: As I said, I would like to--

(Foonote 1 cont.)

THE COURT: I mean, your respective positions are the same I would assume, aren't they, from what you submitted before we passed the order?

MR. BRADLEY: As I said, I would like to put on the racial evidence, but the Court can answer the legal question without that evidence. I would like to put it in.

THE COURT: Well, if it's not relevant to the issue before the court, I question, purely from the Section 5 standpoint, our delaying considering the entry of a final judgment any longer. If y'all had marched over here right after the election, it wouldn't matter, but I'll tell you here on the first of March talking about an order we passed back in November, your time has run out as far as I'm concerned. I really don't understand it; I mean on both sides. I think this thing should've been brought to a head promptly. That's why I'm insisting that we do something now. I think the public deserves the Court to do something. Unless what you're suggesting is relevant to the Section 5, I think the Court ought to move it along.

MR. BRADLEY: Well, I have stated my views of relevance. I don't know that I have anything to add to that.

(Foonote 1 cont.)

> THE COURT: Well, if anybody's got anything from a legal standpoint that ought to be brought to the court of three judges attention before we pass a final ruling, we will certainly hear that. How about on the defense?
>
> MR. COWART: We haven't seen anything from a legal standpoint?
>
> MR. BRADLEY: I am not aware of any developments in the law since the date of that order.
>
> THE COURT: Are you, Mr. Sell?
>
> MR. SELL: No, we have nothing, Your Honor.

Transcript of March 2, 1989, In Chambers Conference, pp. 10-14 (emphasis added).

2. The evidence submitted by plaintiffs will of course be considered by this court when plaintiffs' Section Two claim is decided.

3. This decision has been rendered by only the undersigned judge. In that plaintiffs' failure to file a timely motion acts as a procedural bar to its consideration, no reason exists to reconvene the original three-judge panel. The court notes that, considering the nature of the evidence presented, the motion would have been denied on the merits.

(Foonote 3 cont.)

The court further notes that plaintiffs' motion appears to serve no function other than one of delay, especially in light of statements made by plaintiffs' counsel as included in footnote 1 of this order.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

[Filed May 12, 1989]

C.A. 88-166-1-MAC (WDO)

DAVID LUCAS, et al.,	:
	:
Plaintiffs,	:
	:
vs.	:
	:
JUDY TOWNSEND, et al.,	:
	:
Defendants.	:
	:

O R D E R

Pursuant to an order issued on May 3, 1989, by Chief Judge Wilbur D. Owens, Jr., plaintiffs' motion, styled as a motion to reconsider prior opinion and judgment, to enter a new judgment, or to alter or amend the judgment and supplement the record, was found to have been served in an untimely fashion. Therefore, this court did not consider plaintiffs' motion; instead, it denied same. The court's

determination that plaintiffs' motion was procedurally flawed prompted the court to act without reconvening the three-judge court which had ruled upon the merits of plaintiffs' 42 U.S.C. §1973c voting rights claim.

Plaintiffs' counsel notified this court of his belief that the motion had been served in a timely manner and of his reasons therefor. Upon reading plaintiffs' letter and reviewing the applicable rules of civil procedure, the court determines that plaintiffs' motion was indeed properly served. Thus, this court hereby STRIKES and VACATES its order of May 3, 1989.

SO ORDERED, this 12th day of May, 1989.

s/Wilbur D. Owens, Jr.

Wilbur D. Owens, Jr.
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

[Filed May 16, 1989]

C.A. 88-166-1-MAC (WDO)

DAVID LUCAS, et al.,	:
	:
Plaintiffs,	:
	:
vs.	:
	:
JUDY TOWNSEND, et al.,	:
	:
Defendants.	:
	:

Before HILL, Circuit Judge, OWENS, District Judge, and FITZPATRICK, District Judge.

OWENS, District Judge

On November 2, 1988, a district court panel of three judges denied plaintiffs' motion to enjoin the inclusion of a school bond referendum on the general election ballot submitted to the voters on November 8, 1988. See Lucas v. Townsend, 698 F.Supp. 909 (M.D. Ga. 1988). Plaintiffs brought their motion pursuant to Section

Five of the Voting Rights Act of 1965, see 42 U.S.C. §1973c, and they contended that the form or structure of the bond question as phrased by the Bibb County Board of Education and as submitted to the voters was a change affecting voting. The three-judge panel held that "Georgia school boards before November 1, 1964, were authorized to and had exercised their discretion in formulating questions for bond referendums. The exercise of discretion by the Bibb County School Board [in phrasing the question as it did] was thus no change." Lucas, 698 F.Supp. at 912. Further, the three-judge panel held that "the form or structure of a question on a bond referendum is not a standard, practice, or procedure affecting voting." Id. The referendum was submitted to the voters, and the voters approved the school bond issue by a narrow majority.

On March 7, 1989, following a pretrial conference held in chambers on March 2, 1989, the three-judge panel issued a final decision on plaintiffs' Section Five claim.[1*] The panel stated as follows:

> [T]he decision of the defendant Bibb County Board of Education to submit a single twenty-nine million dollar bond issue by referendum to the voters of Bibb County, Georgia, rather than to submit four separate bond issues for the four categories of school improvements to be paid for by said bond issue, is not encompassed by Section Five of the Voting Rights Act of 1965 and, therefore, did not have to be submitted to the Attorney General of the United States for Section Five preclearance.

Lucus v. Townsend, C. A. 88-166-1-MAC (WDO), unpublished opinion, p. 1 (M.D. Ga., March 7, 1989). Based upon these previous orders, judgment was entered for

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* [Because of the length of footnote 1, the footnotes are printed as endnotes beginning infra, 62a.]

defendants on March 10, 1989.

Despite counsel's statements made during the March 2 pretrial conference to the effect that the three-judge panel's decision and the bases therefor make irrelevant any additional evidence which might be submitted, see supra note 1, plaintiffs have on March 27, 1989, filed a motion to reconsider prior opinion and judgment, to enter a new judgment or alter or amend the judgment and supplement the record. This motion was served on opposing counsel on March 24, 1989. Plaintiffs filed this motion pursuant to Rules 59(a) and (e) and Rule 60 of the Federal Rules of Civil Procedure.

As stated above, the three-judge court decided that the exercise of discretion by the school board in phrasing the question as it did was not a change, additionally, the three-judge court determined that the

form or structure of a question on a bond referendum is not a standard, practice, or procedure affecting voting. Plaintiffs have presented no grounds which justify either the alteration or the amendment of the judgment entered pursuant to those determinations. Plaintiffs have not pointed to any clerical mistakes in the judgment; nor have plaintiffs proffered any evidence, new or otherwise, which goes to the panel's decision.

The bases of plaintiffs' motion seem to be certain statical [sic] data and an expert's interpretation thereof. Neither the proffered statistics nor the expert's opinion reach the central issues in this Section Five claim--whether a local board's exercise of discretion in formulating a question for inclusion on the ballot is a "change" and whether the form or structure of that question is a stan-

dard, practice, or procedure affecting voting. Plaintiffs' tendered evidence merely summarizes voting patterns and turnouts and offers conjectures based on that summary.[2] Such evidence might be helpful in establishing the effects on the minority vote of either a change or a standard, practice, or procedure. It is not applicable to the existence rel. non [sic] of such a change or standard. Such proffered evidence, then, does not provide grounds for relief under either Rule 59 or Rule 60, and is, itself, insufficient to persuade the panel that our judgment should be vacated to reopen this matter for the belated reception of supplemental material.

In accordance with the above discussion, this court of three judges declines to reconsider its previous judgment. Plaintiffs' motions to that

effect, premised upon Rules 59 and 60, are hereby DENIED.

SO ORDERED, this 16th day of May, 1989.

* * * * * * * * *

Endnotes of Opinion of May 16, 1989

1. During the pretrial conference, the court and counsel for plaintiffs engaged in the following discussion:

> THE COURT: It may not but let's talk about Section 5 first. The record is really complete for the Section 5 question, isn't it?
>
> MR. BRADLEY: Well, Your Honor, one of the questions in Section 5 is does something have the potential to have the racial effect. Now, that question can be answered in the negative by saying it is not a covered change as the last opinion the Court had. But if that question isn't answered on that grounds, then the question of can it possibly have a racial effect is relevant to a Section 5 question.
>
> THE COURT: But since it's been answered on that ground, then it

(Foonote 1 cont.)

doesn't have any relevance.

MR. BRADLEY: Yes, Your Honor, although I just made a statement that was a preliminary injunction ruling, it's not a final ruling.

THE COURT: Yes sir, but assuming that the same ruling were issued on a declaratory judgment basis, then there's nothing else to be put in the file, is there?

MR. BRADLEY: I would like the opportunity to put in the file--but you're right, that that question can be answered in the fashion the Court already has without further evidence.

THE COURT: You say you would like the opportunity to put what in the file?

MR. BRADLEY: The racial polarization evidence in. I don't know what it would turn out, but I would like the opportunity to put it in on the Section 5 question, as well as Section 2 claim, of course.

THE COURT: Well, the Section 2 claim is a different question. I'll have to decide that. We're going to separate these two.

MR. BRADLEY: I agree that they are separate questions, they are for separate divisions of the Court.

(Foonote 1 cont.)

THE COURT: Right, but I fail to perceive what the answers to these interrogatories will have to do with a Section 5 question.

MR. BRADLEY: Well, perhaps I articulated badly.

THE COURT: I just don't understand; you work in this area more than I do, so explain it to me.

MR. BRADLEY: Well, you can have something that is clearly a covered change under the Voter Rights Act, but which a Court would say, 'Yes, that is a covered change but there is absolutely no theoretical way that this could have an impact on race, racial effect, and therefore, even though it is a change, it is not covered under Section 5.' So, sometimes whether or not something can have a racial impact is a relevant question, or it always is, and one of the ways you prove that is by showing the effect. If the Court were asking, show me how this could impact on blacks, I would say, well, here's the proof that it did impact. That's how it's relevant.

THE COURT: But if it's not a practice that pertains to voting, it doesn't matter whether it has a racial effect or not, does it?

(Foonote 1 cont.)

MR. BRADLEY: I agree with that statement, Your Honor.

THE COURT: Sure, so then it would be irrelevant to bring in these statistics that you're talking about, if the Court didn't deal with them. The ruling we have made doesn't go to the effect.

MR. BRADLEY: Yes, it depends upon how that legal question is answered. If the Court had said the opposite, that this is a covered change, the defendants would have to be able to come in and say, yes, it's a change but there's no theoretical way it could have a racial impact and put on evidence that they should not be covered by Section 5. That's how it fits into the legal question. But again, the Court having answered in the way it has, if the Court has the same answer on final judgment, then Your Honor is correct.

THE COURT: Well, as to the judgment already rendered, is there anything either of you haven't submitted that you want to submit to the three of us?

MR. BRADLEY: As I said, I would like to--

THE COURT: I mean, your respective positions are the same I would assume, aren't they, from what you submitted before we passed the order?

(Foonote 1 cont.)

MR. BRADLEY: As I said, I would like to put on the racial evidence, but the Court can answer the legal question without that evidence. I would like to put it in.

THE COURT: Well, if it's not relevant to the issue before the court, I question, purely from the Section 5 standpoint, our delaying considering the entry of a final judgment any longer. If y'all had marched over here right after the election, it wouldn't matter, but I'll tell you here on the first of March talking about an order we passed back in November, your time has run out as far as I'm concerned. I really don't understand it; I mean on both sides. I think this thing should've been brought to a head promptly. That's why I'm insisting that we do something now. I think the public deserves the Court to do something. Unless what you're suggesting is relevant to the Section 5, I think the Court ought to move it along.

MR. BRADLEY: Well, I have stated my views of relevance. I don't know that I have anything to add to that.

THE COURT: Well, if anybody's got anything from a legal standpoint that ought to be brought to the court of three judges attention before we pass a final ruling, we will certainly hear that. How about on the defense?

(Foonote 1 cont.)

> MR. COWART: We haven't seen anything from a legal standpoint?
>
> MR. BRADLEY: I am not aware of any developments in the law since the date of that order.
>
> THE COURT: Are you, Mr. Sell?
>
> MR. SELL: No, we have nothing, Your Honor.

Transcript of March 2, 1989, In Chambers Conference, pp. 10-14 (emphasis added).

2. It is not at all certain that the tendered conclusions support the theses sought to be advanced by plaintiffs. Divisions of voters interested in an issue, for or against, may well not be indicative of divisions to be expected from uninterested voters attracted to the polling place by another contest in which they do have an interest. At any rate, such evidence is not of such compelling quality that it should cause us to reconsider, alter, amend or vacate our judgment.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

[Filed June 7, 1989]

C.A. 88-166-1-MAC (WDO)

[714 F.Supp. 525]

DAVID LUCAS, et al., :
:
Plaintiffs, :
:
vs. :
:
JUDY TOWNSEND, et al., :
:
Defendants. :
:

O R D E R

As a part of the general presidential election conducted on November 8, 1988, the voters of Bibb County, Georgia approved a twenty-nine million dollar ($29,000,000.00) bond issue destined to pay for the following improvements in the Bibb County school system:

(1) air conditioning existing schools;

(2) constructing a new north-west Bibb County high school with a proposed approximate ratio of 50% white students and 50% black students; and

(3) renovating Northeast High School for its use as a magnet high school.

Both preceding and after the November 8th general election, plaintiffs failed to convince a three-judge district court, convened in accordance with 28 U.S.C. § 2284(b), that Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973(c), requires approval by the Attorney General of the United States of the county commission's and county school board's decision to submit the twenty-nine million dollar bond issue to the electorate as a single question rather than to submit to the voters each of the three component parts of the proposal for their separate

approval or disapproval. See Lucas v. Townsend, 698 F.Supp. 909 (M.D. Ga. 1988)[1*]; Lucas v. Townsend, Slip Op. No. 88-166-1-MAC (WDO) MAY 16, 1989).

Having failed to prevail on their Section 5 claim, plaintiffs now seek to persuade this court of one judge that, pursuant to Section 2 of the Voting Rights Act, the same conduct found not to be a standard, practice, or procedure affecting voting by a three-judge court has suddenly been transformed by Section 2 into such a standard, practice, or procedure. Arguing that Section 2 coverage is broader than coverage under Section 5, plaintiffs contend that the conduct of defendants in this case, that is, the board's exercise

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* [Because of the length of certain footnotes, the footnotes are printed as endnotes beginning infra, 95a.]

of its discretion in combining the school improvement proposals into one question rather than into several questions, is a standard, practice, or procedure which has prevented individuals in the black community from casting as effective vote.[2]

Discussion

Background

O.C.G.A. §20-2-430 enables county school boards to seek the issuance of bonds upon their determining that the incurrence of such debt is in the best interests of education in the county. That statute provides that the election shall be called and held in the manner prescribed by O.C.G.A. § 36-82-1, a section which describes in detail the notice and other requirements applicable to such issues. In ruling upon challenges to elections held pursuant to the forerunners to these and other statutes,

Georgia courts have established the following principle:

> If it can be said that the proposed improvements are not naturally related or connected, then it is clear that separate submissions are required; if, on the other hand, the several parts of the project are plainly so related that, united, they form in fact but one rounded whole, it is equally clear that they may be grouped together and submitted as one proposition.

Miles v. State of Georgia, 96 Ga. App. 610, 614, 101 S.E.2d 173, 176 (1957) (citations omitted); see Berrie v. State, 119 Ga. App. 148, 166 S.E.2d 631 (1969); compare Rea v. City of LaFayette, 130 Ga. 771 772, 61 S.E. 707, 708, (1908)("two or more separate and distinct propositions cannot be combined into one and submitted to the voters of a county or a municipality as a single question, so as to have one expression of the voter answer all of them.") (emphasis added).

The bond issues submitted to the electorate in both Miles and Berrie each involved numerous projects for improving the respective county school systems as a whole.[3] Clearly, the bond issue submitted to the voters of Bibb County on November 8th involved various proposals for the improvement of the Bibb County school system plainly so related that, united, they form in fact but one related whole. Thus, pursuant to Georgia law, those proposals may be grouped together and submitted as one proposition. See Miles, supra.

Applicable Law

With the above discussion as background, the court now considers plaintiffs' Section 2 allegations. "The essence of a § 2 claim is that a certain electoral law, practice or structure interacts with social and historical

conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Thornburg v. Gingles, 478 U.S. 30, 47, 106 S.Ct. 2752, 2764-65, 92 L.Ed.2d 25, 44 (1986). In evaluating a plaintiff's Section 2 claim, a court must first determine whether the challenged conduct or activity is of a type encompassed by the Voting Rights Act, that is, whether the challenged conduct constitutes a standard, practice, or procedure which affects voting.[4] See generally, Dougherty County, Georgia, Bd. of Education v. White, ("Dougherty County No. 1"), 439 U.S. 32, 99 S.Ct. 368, 58 L.Ed.2d 269 (1978) (holding that a local school board's rule regarding leave without pay for employees desiring to seek elected office and to serve in that capacity was a standard, practice,

or procedure affecting voting); Delgado v. Smith, 861 F.2d 1489 (11th Cir. 1989) (holding that the Voting Rights Act does not reach the activities of private citizens in their petition efforts to place a referendum on the ballot); see also White v. Dougherty County Bd. of Education ("Dougherty County No. 2"), 579 F. Supp. 1480 (M.D. GA. 1984), aff'd, 470 U.S. 1067, 105 S.Ct. 1824, 85 L.Ed.2d 125 (1985) (holding that individual personnel decisions regarding employee's request for leave without pay to serve in elected capacity was not a standard, practice, or procedure with respect to voting). In considering whether the conduct alleged in this case is a standard, practice, or procedure with respect to voting, the court is cognizant both that the phrase "standard, practice, or procedure" must be

given the broadest scope possible, Allen v. Board of Elections, 393 U.S. 544, 566-67, 89 S.Ct. 817, 832-33, 22 L.Ed.2d 1, 17-18 (1969), and that "'voting' includes 'all action necessary to make a vote effective.'" Id. at 565-66, 89 S.Ct. at 832, 22 L.Ed.2d at 7, citing 79 Stat. 445, 42 U.S.C. § 1973l(c)(1).

Because of an absence of authority on the subject, see supra note 4, and because the views of the Attorney General regarding the scope of the Voting Rights Act are entitled to particular deference, see Dougherty County No. 1, 439 U.S. at 39, 99 S.Ct. at 372-73, 58 L.Ed.2d at 278, the three-judge panel, during the prior Section 5 litigation, invited the United States to submit a brief as amicus curiae. Therein, commenting upon 28 C.F.R. § 51.13(j), the United States stated that "[i]t is

unquestioned that the 'method of offering issues and propositions for approval by referendum' is such a standard, practice or procedure that, if changed, is subject to Section 5 review." Brief for the United States as Amicus Curiae ("Amicus" Brief"), pp. 13-14, citing 28 C.F.R. § 51.13(j). However, the United States continued as follows:

> Here, the facts of record would tend to suggest that the defendants' discretionary decision to present the voters with a single vote on the entire bond project is not the kind of change subject to preclearance. Selecting a number of projects to be financed under one bonding authority would seem to be a normal legislative decision unrelated to the process of holding elections. It is essentially the same kind of determination as the amount of bonded indebtedness required for a project, the interest rate the board is willing to pay or the term of the bonds.

Amicus Brief, pp. 16-17 (emphasis added).

The somewhat inconsistent statements made by the Attorney General evidence both the novelty of plaintiffs' argument and the difficulty of the question presented. However, upon consideration, this court finds implicit in the Attorney General's comments the idea that the "methods" brought within the meaning of 28 C.F.R. § 51.13(j) are not those discretionary decisions made by properly elected legislative officials "in the best interest of education"; instead, the regulation refers to those barriers, be they subtle or obvious, which obstruct the paths leading to the registration of voters, the casting of votes, the tabulation of votes and the requirements for election or passage, i.e., approval by majority vote, or by plurality vote, or by a two-thirds margin.

The general idea stated just above

finds support in the legislative history developed in regard to the 1982 amendments to the Voting Rights Act. See generally, Senate Rep. No. 97-417, 97th Congress, 2nd Session, pp. 1-43, reprinted in 1982 U.S. Code Cong. & Ad. News, pp. 177-221 (citations hereafter will be to pages in 1982 U.S. Code Cong. & Ad. News). The original intent of Section 2 of the Voting Rights Act of 1965 was to ban "'any kind of practice...if its purpose or effect was to deny or abridge the right to vote on account of race or color.'" 1982 U.S. Code Cong. & Ad. News, p. 194 (footnote omitted), quoting Attorney General Katzenbach. "[S]ection 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy." Id. at 206. Congress

noted that the vast majority of Section 2 cases have "dealt with electoral system features such as at-large elections, majority vote requirements and districting plans." Id. at 207; see e.g. Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973)(en banc), aff'd on other grounds sub nom East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976).[5]

Each of the cases mentioned, discussed, or noted above addresses a standard, practice, or procedure which clearly impacts a minority individual's access to and participation in the electoral process. Those cases must be contrasted with the alleged standards, practices, or procedures in Dougherty County No. 2, supra;

Delgado v. Smith, supra; Burger v. Judge, 364 F.Supp. 504 (D. Mont. 1973), aff'd 414 U.S. 1058, 95 S.Ct. 563, 38 L.Ed.2d 465 (1973); and Kohler v. Tugwell, 292 F.Supp. 978 (E.D. La. 1968), aff'd 393 U.S. 531, 89 S.Ct 879, 21 L.Ed.2d 755 (1969). In Dougherty County No. 2, though plaintiff John White's claim was based upon Section 5, the three-judge panel's decision hinged upon whether certain actions taken by the school board constituted a standard, practice, or procedure.[6] The actions referred to involved various decisions made by the Dougherty County school board either authorizing or refusing to authorize leave without pay for school employees who wished to campaign for and serve in certain elected positions. In one instance, the panel determined that the school board's decision "did not constitute a 'standard, practice or procedure'

pertaining to employee absence. It was nothing more than an individual personnel decision." Id. at 1491-92 (footnotes omitted). A second decision by the school board was found not to be a standard, practice, or procedure because in light of its conditional nature it failed to establish "a precedent on which the affected employees and others may rely...." Id. at 1492. Finally, the three-judge court found that, despite the defendant school board's own characterization of its decision as a policy on political leave, "the board in reality decided not to allow its employees who are elected to public office greater time away from the job than they and all other employees are otherwise allowed." Id.[7]

In Delgado v. Smith, supra, the Eleventh Circuit considered whether citizen initiative petitions come within the

Voting Rights Act. The court stated that "[t]here is no question that the sole purpose of [the Voting Rights Act] was to ensure the integrity of the registration and voting process by eradicating barriers which had previously prevented blacks from voting." Delgado, 861 F.2d at 1492. The court cited with approval a decision which found the petition process too far removed from the voting booth to fall under the Act. Id. at 1493, citing Zaldivar v. City of Los Angeles, 590 F.Supp. 852 (C.D. Cal. 1984), rev'd on other grounds, 780 F.2d 823 (9th Cir. 1986). The Eleventh Circuit panel concluded that "the history of the Act, the stated intention of Congress, and the relevant case law persuade us that the Voting Rights Act could not properly be applied to the case before us." Id. at 1493.

In Burger v. Judge, supra, a three-

judge panel considered the merits of plaintiffs' contentions that the citizens of Montana, in voting on four propositions submitted to the electorate by a Constitutional Convention, had been misled as to the effects of their votes by (1) the official ballot, (2) an official publication mailed to all voters, (3) a newspaper supplement, (4) an analysis prepared by the Constitutional Convention Commission, (5) the debate during the Constitutional Convention, and (6) a particular state statute. Burger, 364 F.Supp. at 508-09. The court, after a discussion of plaintiffs' arguments, stated that "[i]n any event, it is clear that all electors who were in fact opposed to the proposed constitution could have expressed their disapproval by voting against it." Continuing, the court stated as follows:

> This is not a case where any electors were deprived of a right to vote or where there was any debasement or dilution in their votes. Nor is it a case where the voters were misled with respect to the content or meaning of any of the issues submitted to them. The 7,302 electors clearly had a right and opportunity to vote on the proposed constitution and in fact were urged to do so.
>
> If, under these circumstances, any electors were in fact misled, they were simply mistaken as to the effect of their abstention from voting and not deprived of any right or opportunity to vote in violation of Article IV, Section 4 of the Constitution of the United States, the Fourteenth Amendment to the Constitution, or the Voting Rights Act of 1965 (42 U.S.C. § 1973).

Id. at 511-12 (footnotes omitted).

Finally, in Kohler v. Tugwell, supra,[8] a three-judge panel heard plaintiffs' claim that "the designation of the amendment as it appeared on the state ballot misled voters. Hence, they contend that those who voted in favor of the enactment were deprived of their right to

vote...." Kohler, 292 F.Supp. at 979. The panel agreed with plaintiffs that the amendment was phrased in a manner "so turgid that it would be difficult to say that any ballot designation could describe it accurately." Id. at 980. Quoting Reynolds v. Sims, 377 U.S. 533, 554, 84 S.Ct. 1362, 1377, 12 L.Ed.2d 506, 523 (1964), the court noted that "the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." Kohler, 292 F.Supp. at 981. The Kohler panel went on to state as follows:

> However, a federal court must not interfere with the internal affairs of a State unless it is necessary to do so to protect those rights guaranteed every citizen by the Federal Constitution. The procedure followed by Louisiana does not deprive the plaintiffs of Due Process for it is sufficient that Louisiana's voters were informed by the ballot of the subject of the amendment, were given a fair opportunity by publication to consider its full

> text, and were not deceived by the ballot's words.

Id. (footnote omitted).

Analysis

Quite clearly, the issues raised by plaintiffs in the case before this court are not identical to those issues discussed in the cases above. However, the extensive examination of the relevant statutory, regulatory and case law has convinced this court that the conduct attacked by plaintiffs in this case is not a standard, practice, or procedure as those terms are understood. First, it seems clear to this court that the Voting Rights Act addresses the right to vote; it does not address the deliberative process of local or state boards. Second, plaintiffs have presented no evidence to this court of any policy or mathematical formula by which or pursuant to which the

school board of Bibb County arrives at the manner in which any particular proposal decided to be in the best interests of education should be submitted to the electorate. Instead, like the situation presented in Dougherty County No. 2, the evidence suggests that the decision to submit the proposed improvements to the voters in one question rather than in two or more questions was a singular decision premised upon the facts of this particular situation. That the decision was to some degree premised upon political realities does not undermine that decision; nor does it make that decision in some fashion sinister or manipulative. Elected bodies like the school board of Bibb county, comprised of individuals nominated and elected in presumably valid elections in which all voters had an equal opportunity to participate, must be afforded some

freedom to engage in the traditional political tools of consensus-building and compromise to effectuate comprehensive plans for school and community development and improvement. Government in the United States, be it federal, state or local, takes the form of representative democracy. That does not mean, of course, that representatives once elected are free to disregard the law; however, the functioning of a representative democracy must be contrasted with the functioning of a pure democracy. Representatives are elected to pursue an agenda which benefits the community at large. They may be re-elected or cast out of office, depending upon their performance or lack thereof. This scheme of government does not contemplate a vote by every individual on every single issue in isolation or in the abstract. Some trust and some faith must be placed

in the elected representatives of the people. The Georgia cases discussed supra recognize that principle and establish boundaries beyond which that trust is suspect. And as those cases demonstrate, Georgia law provides various mechanisms by which the citizens may challenge the conduct of their representatives in this regard.

To accept plaintiffs' position in this matter is to invite chaos. Any and all matters which are to be submitted to the electorate for its approval or disapproval, be that matter a proposal by a local board for a bond issue to construct a new high school or be it an amendment proposed by a state legislature, would be subject to challenge under the Voting Rights Act.[9] This court finds plaintiffs' position unfounded either in law or in logic. Section 2(a) of the Voting Rights

Act "prohibits all states and political subdivisions from imposing any qualifications or prerequisites to voting, or nay standards, practices, or procedures which result in the denial or abridgment of the right to vote...." Thornburg v. Gingles, 478 U.S. at 43, 106 S.Ct. at 2762, 92 L.Ed.2d at 42. However, Section 2(b) expressly cautions that "nothing in [§2] establishes a right to have members of a protected class elected in numbers equal to their proporiton in the population." Id. at 43, 106 S.Ct. at 2763, 92 L.Ed.2d at 42 (brackets in original). This statutory language establishes a boundary to the concept of "vote effectiveness"; by analogy, Section 2 clearly does not establish a right to have those proposals which must be submitted to the electorate phrased in such a way that any particular group is ensured of success. Yet that is

what plaintiffs desire--an opportunity to isolate certain issues which are allegedly favorable to a particular group at the expense of a comprehensive plan which elected officials have formulated for the overall good of the community.

The reapportionment decisions of the Supreme Court[10] support this court's understanding of the term "vote effectiveness" as that term relates to the concept of "dilution." Clearly, political units may not structure voting districts in such a manner as to make impossible the election of minority candidates. The matter before this court, however, is qualitatively different from such a situation. Here, each individual, black and white, had an opportunity to cast an effective vote for or against a comprehensive school improvement/development plan. The matter was thoroughly discussed in the

community. No voter was misled. This court cannot find that "vote effectiveness" means a right to vote on each individual issue considered by its elected officials.

This court reiterates what the Burger court recognized earlier: every individual qualified to vote in the November 8th election had the opportunity to express his or her approval or disapproval of the bond issue. Those voters, like the school board itself, had to weigh the pros and cons of the proposal as a whole. Then, based on their understanding of the merits of that proposal, the voters expressed their preference, albeit by a narrow majority, to support a comprehensive scheme of improvement in the Bibb County school system. Such is the way in which the political system functions.

In conclusion, this court determines

that the exercise of discretion by validly elected local board officials in determining the number of questions to be submitted to the electorate for its approval or disapproval at the ballot box is not a standard, practice, or procedure. Alternatively, the court finds that even if such exercise of discretion was a standard, practice, or procedure, such practice does not affect voting. The manner in which the proposal was structured had and has absolutely no bearing upon the qualification of any individual to vote, the ability of any individual to register to vote, the opportunity of any individual to cast this or her vote, or the manner in which any individual's vote was tabulated. Plaintiffs' claim as premised upon Section 2 of the Voting Rights Act is therefore DENIED.[11]

SO ORDERED, this 7th day of June, 1989.

s/Wilbur D. Owens, Jr.

Wilbur D. Owens, Jr.
United States District Judge

* * * * * * * * *

Endnotes

1. Section 5 of the Voting Rights Act requires that certain "changes affecting voting" be precleared by the Attorney General of the United States prior to their implementation. The three-judge panel held that the Bibb County school board's exercise of its discretion in formulating questions for bond referendums was not a change affecting voting. Further, the court held that "the form or structure of a question on a bond referendum is not a standard, practice or procedure affecting voting. The discretionary decision to submit one or more questions to the electorate is one properly left to the political process." Lucas, 698 F.Supp. at 912.

2. Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or

(Foonote 2 cont.)

> abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the quarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973l(c)(1) defines "vote" or "voting" for purposes of sections 2 and 5. It reads as follows:

(Foonote 2 cont.)

> (c)(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

See also 28 C.F.R. § 51.2.

3. For example, the bond issue in dispute in Miles involved a proposal to finance improvements in the Bacon County, Georgia school system, and the use of the funds derived from the sale of the bonds was explained as follows:

> [The funds derived from the sale of the bonds would be] for the purpose of providing funds to build, construct and equip new educational facilities such as school buildings, libraries, auditoriums, cafeterias, gymnasiums, athletic fields and buildings, and structures useful in connection therewith, adding to, improving and equipping existing properties and facilities of the Bacon County School System and acquiring the necessary property there-

(Foonote 3 cont.)

> for and paying expenses incident thereto.

Miles, 96 Ga. App. at 613, 101 S.E.2d at 176.

4. Neither the statutes (sections 1973 and 1973c) nor the regulations promulgated pursuant to section 1973c, see 28 C.F.R. §§ 51.1, et. seq., defines a standard, practice, or procedure as those terms are employed in section 1973. See Dougherty County No. 1, 439 U.S. at 37, 99 S.Ct. at 371-72, 58 L.Ed.2d at 277. 28 C.F.R. § 51.13 enumerates examples of "changes affecting voting," most of which relate to practices or procedures pertaining to (1) qualifications, eligibility, or registration for either voting or running for office, (2) boundaries for representative districts, voting precincts or voting units, (3) locations of polling places, and (4) methods of determining the outcome of elections. Only section 51.13(j), which concerns changes "affecting the necessity of or methods for offering issues and propositions for approval by referendum," appears at all relevant to the matter before this court. This court has been unable to discover, and the parties in their pleadings have failed to include, cases interpreting this section.

However, as illustrative of the types of conduct or activities which courts have found to constitute standards, practices, or procedures with respect to voting, the

(Footnote 4 cont.)

court includes the following summary of "changes" which the Supreme Court has found to be covered under Section 5 of the Voting Rights Act. This summary is contained in NAACP, DeKalb County Chapter v. State of Georgia, 494 F.Supp. 668, 678 (N.D. Ga. 1980).

> --a change from district to at-large voting for county supervisors, Allen v. State Board of Elections, supra, 393 U.S. at 569, 89 S.Ct. at 833-34;
>
> --a change from electing to appointing an important county officer in certain counties, Allen v. State Board of Elections, supra, 393 U.S. at 569-70, 89 S.Ct. at 834;
>
> --an amendment to balloting procedure which provides that "no person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election," Allen v. State Board of Elections, supra, 393 U.S. at 570, 89 S.Ct. at 834;
>
> --a new procedure for casting write-in votes, Allen v. State Board of Elections, supra 393 U.S. at 570, 89 S.Ct. at 834;
>
> --a change in the location of polling places, Perkins v. Matthews, supra, 400 U.S. at 387, 91 S.Ct. at 436;

(Foonote 4 cont.)

--municipal annexations, Perkins v. Matthews, supra, 400 U.S. at 388, 91 S.Ct. at 437;

--the change from ward to at-large elections of city aldermen, Perkins v. Matthews, supra, 400 U.S. at 394, 91 S.Ct. at 439-40;

--a state statute which staggered the terms of the three members of a county Board of Commissioners of Roads and Revenues, Berry v. Doles, 438 U.S. 190, 191, 98 S.Ct. 2692, 2694, 57 L.Ed.2d 693 (1978);

--a city's decision to change from an aldermanic system of government to a system in which councilmen are elected at large, United States v. Board of Commissioners of Sheffield, Alabama, supra, 435 U.S. at 110, 98 S.Ct. at 983; and

--a rule by a county board of education requiring employees to take unpaid leaves of absence while campaigning for public office, Dougherty County, Georgia Board of Education v. White, supra, 439 U.S. at 47, 99 S.Ct. at 377.

5. Congress emphasized, however, that "section 2 remains the major statutory prohibition of all voting rights discrimination. It also prohibits practices which, while episodic and not involving permanent structural barriers,

(Footnote 5 cont.)

results in the denial of equal access to any phase of the electoral process for minority group members." 1982 U.S. Code Cong. & Ad. News, p. 207.

Footnote 119 of the Senate Report, in illustration of the scope of Section 2, states as follows:

> This aspect of the statute's scope is illustrated by a variety of Section 2 cases involving such episodic discrimination. For example, a violation could be proven by showing that the election officials made absentee ballots available to white citizens without a corresponding opportunity being given to minority citizens. See Brown v. Post, 279 F.Supp. 60, 63-64 (W.D. La. 1968). Likewise, purging of voters could produce a discriminatory result if fair procedures were not followed, Toney v. White, 488 F.2d 310 (5th Cir. 1973), or if the need for a purge were not shown or if opportunitites for re-registration were unduly limited. Administration of an election could likewise have a discriminatory result if, for example, the information provided to voters substantially misled them in a discriminatory way. United States v. Post, 297 F.Supp. 46, 50-51 (W.D. La. 1969).

1982 U.S. Code Cong. & Ad. News, p. 208.

(Foonote 5 cont.)

Two additional cases further illuminate the scope of Section 2. In Brown v. Dean, 555 F.Supp. 502 (D. R.I. 1982, the court held that "the location and accessibility of a polling place have a direct effect on a person's ability to exercise his franchise." Id. at 505, citing Perkins v. Matthews, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971). The court found a violation of Section 2 and ordered the polling place relocated. In Miss. State Chapter Operation PUSH v. Allain, 674 F.Supp. 1245 (N.D. Miss. 1987), the court identified the following voter registration laws as practices in violation of Section 2: (1) the state's failure to make certain amendments to Mississippi's election laws retroactive to that category of voters who had registered with a county registrar prior to August 3, 1984; (2) the state's failure to mandate deputization of all municipal clerks as deputy county registrars; and (3) the state's failure to require satellite registration on a uniform statewide basis, thus hindering the ability of minority members to participate in the political process. Id. at 1268.

6. The court noted as follows: "Assuming that this court finds that any such standard, practice or procedure was adopted, the second question to be answered is whether or not it is 'with respect to voting....'" Dougherty County No.2, 579 F.Supp. at 1490.

7. The court summarized as follows:

> Viewed from every angle and in the brightest light of the Supreme Court's broad interpretations of the words "standard, practice, and procedure," this board's refusal to alter its neutral personnel policies to accommodate this employee elected office holder does not possibly constitute a Section 5 "standard, practice, or procedure."
>
> ...
>
> There having been no "standard, practice, or procedure" enacted or sought to be administered, it is unnecessary to consider whether or not the conduct of the defendant board was "with respect to voting."

Id. at 1493 (footnote omitted).

8. The plaintiffs in Kohler were proceeding under the United States Constitution, Article 4 § 4 and Amendment 14. The Voting Rights Act was not at issue in the case. However, the discussion in Kohler sheds some light on the matter before this Court. Additionally, the court notes that the Fourteenth Amendment to the Constitution of the United States is one of the sources of the Voting Rights Act. See United States v. Marengo County Commission, 731 F.2d 1546, 1555 (11th Cir. 1984), appeal dismissed, cert. denied, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed2d 311 (1984).

9. Language from Dougherty County No. 2 is informative on this point:

> In response defendant school board argues that plaintiff in effect is suggesting that under the Voting Rights Act the Attorney General or the United States District Court for the District of Columbia must pass judgment upon every board of education decision to grant or withhold leave without pay to an elected official to attend to the duties of his office. If this be true, the defendant board suggests the Voting Rights Act has removed the board's authority to do anything without going to Washington for approval.

Dougherty County No. 2, 579 F.Supp. at 1490, citing Dougherty County No. 1, 439 U.S. at 54, 99 S.Ct. at 380, 58 L.Ed.2d at 287 (Powell, J., dissenting). The basis of the concern expressed by the three-judge panel above has come to pass in the case sub judice. The following discussion, elicited during the hearing on plaintiffs' Section 5 claim, illustrates that the concern expressed by the three-judge panel in Dougherty County No. 2 was well founded.

> JUDGE HILL: Well now, let me be sure I understand your contention. Would that apply no matter how they came down if they--if they discussed what to put on, then whatever answer they came up with would be a Voting Rights Act change? Let me be a little clearer. Suppose they had come up with the idea, "We shall put each of these separate,"

(Footnote 9 cont.)

that would be a change?

MR. BRADLEY: Yes, Your Honor.

JUDGE HILL: And if they'd said, "We will put each school to be air conditioned separately," that'd be a change and if they said, "We'll put them all together," that would be a change so however they decided to put the question would have to be precleared?

MR. BRADLEY: When they're deciding what questions to put on the ballot, yes, Your Honor. To back up from that to perhaps more clearly explain my position, if they debate whether or not to air condition schools and decide they're going to air condition half of them--

JUDGE HILL: Suppose they decide to air condition all of them but they decided the way to put this would be to put to the voters each as a separate bond issue, so many dollars to air condition School "A" and so many dollars for School "B" as a separate question and "C" and all the rest, that would be subject to preclearance?

MR. BRADLEY: Yes, Your Honor.

JUDGE HILL: And if they decided to air condition all the schools and put that question, "Shall we air condition all the schools?" that would require

(Foonote 9 cont.)

preclearance?

MR. BRADLEY: Yes, Your Honor.

JUDGE HILL: So there would be no question that could be put in a bond referendum anywhere in any jurisdiction covered by the Act that would not have to be precleared by the Department of Justice, would there? Could you conceive of one?

MR. BRADLEY: Because bond issues are not regularly scheduled elections, I don't beleive I can conceive of one.

JUDGE HILL: Well now, I'm assuming the date issue now is out of the window, that's been precleared?

MR. BRADLEY: Yes, Your Honor.

JUDGE HILL: So even if you had--if the Constitution of a state established the dates upon wich bond issues would be put, the construction of the question would still be subject to preclearance, is that right?

MR. BRADLEY: Yes, Your Honor.

JUDGE FITZPATRICK: Let me ask you this question, what if we're dealing with one school and you want to--the School Board says, "Well, we want to air condition this school and we also want to build a gymnasium there at this school and while we're doing that, we need to

(Footnote 9 cont.)

enlarge the library to make the library more attractive and do three or four different projects all on this--in this same school," would you have to separate each one of those projects, for instance, to give people [a chance] to say, "Well we want to air condition it but we don't want the new gym. We don't think we ought to refurbish the library," or "build a new teacher's lounge," or whatever, is that--am I off in the wild blue yonder with this scenario?

MR. BRADLEY: No, Your Honor. And my answer is the Board does not have to separate it; it can make whatever choice it wants to, to have five bond issues for each particular facility or to have one.

JUDGE FITZPATRICK: Oh, you could have a bond issue to say to--dealing with Northwest School or Southeast School or whatever, $25,000,000 to air condition, build a gym, refurbish the auditorium, all of that, and you could--you vote for it or against it?

MR. BRADLEY: The Board could do that.

JUDGE FITZPATRICK: And that would be okay?

MR. BRADLEY: They would still have to submit it for preclearance under the Voting Rights Act.

(Footnote 9 cont.)

Transcript of November 1, 1988, Hearing Before Three-Judge District Court, pp. 9-12.

10. See Beer v. United States, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976); Georgia v. United States, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973).

11. The court's resolution of this matter negates the need to consider the "results" of the alleged standard, practice, or procedure. The 1982 amendments to the Voting Rights Act re-instituted the "results" test, making clear that a Section 2 violation could be proved by showing discriminatory effect alone. See Thornburg, 478 U.S. at 35, 106 S.Ct. at 2758, 92 L.Ed.2d at 37. The court is aware that plaintiff has filed certain information regarding voting patterns in the bond issue and other elections. Plaintiff has also filed voluminous documents entitled plaintiffs' request for judicial notice of historic racial discrimination. The court has examined those pleadings; however, those documents are pertinent to the "results" aspect of this case, an issue which this court did not reach.

###

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

[Filed June 14, 1989]

Civil Action No.
88-166-1-MAC (WDO)

DAVID LUCAS, WILLIE DAVIS, JR., CONNIE CATER, CORLIS McKENZIE and RONNIE T. MILEY,

Plaintiffs,

vs.

JUDY TOWNSEND, in her official capacity as President of the Board of Public Education and Orphanage for Bibb County, BOARD OF PUBLIC EDUCATION AND ORPHANAGE FOR BIBB COUNTY, EMORY GREENE, in his official capacity as Chairman of the Bibb County Board of Commissioners, BIBB COUNTY BOARD OF COMMISSIONERS, A.B. "TONY" CALDWELL, in his official capacity as Chairman of the Macon-Bibb County Board of Elections, MACON-BIBB COUNTY BOARD OF ELECTIONS, and BERNARD FLETCHER, in his official capacity as Superintendent, Macon-Bibb County Board of Elections,

Defendants.

NOTICE OF APPEAL

Come now the plaintiffs, David Lucas, Willie Davis, Jr., Connie Cater, Corlis McKenzie and Ronnie T. Miley, listed above, and give notice of their appeal to the Supreme Court of the United States from the final judgment of the three-judge district court entering judgment in favor of defendants. Plaintiffs appeal the opinions and judgment of the three-judge district court, the opinion entered March 7, 1989, the judgment entered March 10, 1989, and the opinion entered on May 16, 1989, denying plaintiffs' timely motion to reconsider the previous judgment under Rules 59 and 60, F.R.Civ.P. Notice is also given that the opinion entered November 2, 1988 is also appealed to the extent that the opinion of March 7, 1989 relied upon and adopted the reasons set

forth in that opinion.

This appeal is taken pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

Respectfully submitted,

s/NeilBradley

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###

28 U.S.C. § 1253 Direct Appeals From Decisions of Three-Judge Courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a

district court of three judges.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c

Whenever a State or political subdivision with respect to which the prohibitions set for in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualifica-

tion or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect

of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within

sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this

section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

###

28 Code of Federal Regulations, Part 51
(52 Fed. Reg. 490, Jan. 6. 1987)

§ 51.12 Scope of requirement.

Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the section 5 preclearance requirement.

§ 51.13 Examples of changes.

Changes affecting voting include, but are not limited to, the following examples:

...

(j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.

...

§ 51.17 Special elections.

(a) The conduct of a special election (e.g., an election to fill a vacancy; an initiative, referendum, or recall election; or a bond issue election) is subject to the preclearance requirement to the extent that the jurisdiction makes changes in the practices or procedures to be followed.

(b) Any discretionary setting of the date for a special election or scheduling of events leading up to or following a special election is subject to the preclearance requirement.

...

§ 51.27 Required contents.

Each submission should contain the following information or documents to enable the Attorney General to make the required determination pursuant to Section 5 with respect to the submitted change affecting voting:

(a) A copy of any ordinance, enactment, order, or regulation embodying a change affecting voting.

(b) A copy of any ordinance, enactment, order, or regulation embodying the voting practice that is proposed to be repealed, amended, or otherwise changed.

(c) If the change affecting voting either is not readily apparent on the face of the documents provided under paragraphs (a) and (b) of this section or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior

law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.

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